The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Gumsur, Ltd.

File: B-231630

Date: October 6, 1988

DIGEST

Protest that agency improperly applied a domestic item restriction contained in an appropriation act is denied where the agency reasonably determined that the items being procured are within the coverage of the act because they are "clothing" and that an exception contained in the act does not apply because the items are not "chemical warfare protective clothing."

DECISION

Gumsur, Ltd., protests the rejection of the bid it submitted in response to invitation for bids (IFB) No. DAAC89-88-B-0063, issued by the Tooele Army Depot, Tooele, Utah. Gumsur seeks a recommendation that the Army either award the contract to Gumsur or cancel the solicitation and recompete the requirement. Gumsur also requests reimbursement of the costs it incurred in pursuing this protest. We deny the protest and the request for costs.

The IFB is for demilitarization protective ensembles (DPEs), which are protective coverings worn by civilian personnel to access toxic areas to dismantle chemical munitions. The ensemble is a one-piece suit that totally encapsulates the worker. The Army received six bids, with Gumsur, an Israeli firm, submitting the low bid. Vinyl Technology, Inc., the second low bidder, protested to the Army that award should not be made to Gumsur because Gumsur intended to provide DPEs manufactured in Israel. In reviewing Vinyl's protest, the Army determined that under the so-called Berry Amendment, the DPEs must be manufactured domestically. As a result, and despite the fact that the solicitation did not contain a domestic item restriction, the Army excluded Gumsur's bid from consideration. Gumsur subsequently filed this protest.

The Berry Amendment has been included in various forms in Department of Defense (DOD) appropriation acts since 1941. The current provision, in relevant part, provides:

> "No part of any appropriation contained in this Act . . . shall be available for the procurement of any article or item of food, clothing, tents, tarpaulins, covers, cotton and other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, canvas products, or wool . . . or any item of individual equipment manufactured from or containing such fibers, yarns, fabrics or materials . . . not grown, reprocessed, reused, or produced in the United States or its possessions . . . Provided, That nothing herein shall preclude the procurement of . . . chemmical warfare protective clothing produced outside the United States or its possessions when such procurement is necessary to comply with agreements with foreign governments requiring the United States to purchase supplies from foreign sources for the purposes of offsetting sales made by the United States Government or United States firms under approved programs serving defense requirements . . . ." Pub. L. No. 100-202, § 8011, 101 Stat. 1364 (1987). (Emphasis in original.)

The Army's position is that the DPEs are covered by the Berry Amendment because they are "clothing"1/ and because they are made of "synthetic fabric or coated synthetic fabric." The DPEs do not come within the coverage of the proviso contained in the amendment, argues the Army, because they are not "chemical warfare protective clothing," but rather are intended solely for use by civilian personnel.

Gumsur contends that the ensembles are not clothing, are not comprised of synthetic fabric or coated synthetic fabric, and therefore are not subject to the domestic item restriction in the Berry Amendment. Gumsur argues that the ensembles are safety equipment that provide protection from chemical agents, not clothing as that term commonly is understood. With respect to whether the DPEs are made of synthetic fabric, Gumsur cites the Textile Fiber Products Identification Act, which defines "fabric" as "any material woven, knitted, felted, or otherwise produced from, or in

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1/ The Army argues that, generally, "items worn by individuals fall within the definition of clothing."

combination with, any natural or manufactured fiber, yarn, or substitute therefor." 15 U.S.C. § 70(f) (1982). By contrast, the specifications for the DPEs require them to be comprised of alloyed chlorinated polyethylene film, which is essentially a laminated plastic material, and polyvinyl chloride. Gumsur contends that the legislative history of the Berry Amendment indicates that Congress wanted to protect the textile industry, not the plastics industry.

Alternatively, Gumsur argues that if the ensembles are considered to be clothing or to be comprised of fabric, they are excepted from the domestic item restriction as "chemical warfare protective clothing" because the ensembles are worn exclusively to protect individuals from chemical warfare equipment. Gumsur contends that the United States is a party to a memorandum of understanding with Israel under which the United States is required to purchase Israeli supplies to offset sales made by the United States to Israel.

Finally, Gumsur argues that because the solicitation did not contain a domestic item restriction, the Army may not now use the Berry Amendment to deny a contract to the firm. Gumsur contends that if the Army believes that the Berry Amendment applies, the agency must cancel the IFB and issue a new one, thus affording Gumsur an opportunity to challenge the restriction in a pre-bid opening protest.

The principal issue for us to decide is whether the Army's determination that the Berry Amendment applies to this procurement is reasonable. In this regard, where resolution of a protest requires an interpretation of restrictions contained in an appropriation act, the interpretation given the act by the agency charged with its implementation is entitled to deference in the absence of evidence demonstrating that the agency's interpretation is clearly incorrect. A & P Surgical Co., Inc., et al., B-206111.2, et al., Mar. 16, 1983, 83-1 CPD ¶ 263. Here, based on our review of the record and relevant legislative history, we conclude that the Army reasonably determined that the term "clothing" contained in the Berry Amendment encompasses the DPEs being procured here and that the DPEs are not "chemical warfare protective clothing."

The Berry Amendment, as originally enacted in the Fifth Supplemental National Defense Appropriation Act, 1941, Pub. L. No. 77-29, 55 Stat. 123, covered only food and clothing. The Act did not contain a definition of clothing, and the legislative history of that Act indicates only that Congress primarily was concerned with protecting producers of cotton and wool products. Over the years, the coverage

of the Amendment has been expanded to reflect the belief that certain American industries should be protected from foreign competition. See, e.g., S. Rep. No. 494, 90th Cong., 1st Sess. 67 (1967) (concerning extension of the Amendment to synthetic fabric). In 1978, however, DOD asked Congress for an exception to the Amendment for "protective clothing," which DOD said would include "[c]hemical warfare protective garments, aircrew flight suits, aircrew immersion suits, special purpose helmets, chemical protective overboots, firemen suits, grenade carriers, armored vests, chemical protective gloves, firemen's insulated boots, and extra-cold weather boots." Department of Defense Appropriations Act for 1979: Hearings Before the House Committee on Appropriations, 95th Cong., 2d Sess. 25 (1978). Congress was concerned that the term "protective clothing" was "too broad and could be interpreted to include most clothing items," H.R. Rep. No. 1398, 95th Cong. 2d Sess. 384 (1978) (conference report), and therefore allowed an exception only for chemical warfare protective clothing. See Pub. L. No. 95-457, § 824, 92 Stat. 1231, 1248 (1978).

We think it is clear from the legislative history that the term "clothing" as used in the Berry Amendment has been thought to include a wide variety of items. In considering DOD's proposed exception to the Amendment in 1978, Congress expressed no disagreement with DOD's conclusion that all of the listed items the Department sought to have excluded from the Amendment would otherwise be covered by the Amendment as "clothing." It is clear also that Congress intends for the Berry Amendment to be read broadly since the purpose of the Amendment is to protect the nation's industrial base. H.R. Rep. No. 498, 100th Cong., 1st Sess. 665-66 (1987) (conference report on continuing resolution for fiscal year 1988). Although we recognize that the DPEs being procured here have a specialized use, we have no basis to question the Army's determination that "clothing" as used in the Berry Amendment is broad enough to include these items.2/

We also cannot question the Army's determination that the DPEs are not included within the "chemical warfare protective clothing" exception to the Berry Amendment. The legislative history of that exception indicates that Congress intended to carve out only a narrow exception for the items DOD said it was most interested in obtaining from

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2/ Because we conclude that the agency reasonably determined that the DPEs are covered by the Berry Amendment because they are clothing, we need not decide whether the Amendment also would apply on the basis that the DPEs are made of synthetic fabric.

foreign sources. Consistent with that intent, the Army's position is that "chemical warfare protective clothing" means only garments or ensembles capable of being worn by military personnel engaged in chemical warfare. Since the DPE's, because of their design and support requirements, would not have that capability, the Army argues that the DPEs are not "chemical warfare protective clothing." We cannot say that this reading of the exception to the Berry Amendment is unreasonable.

Finally, the fact that the solicitation did not contain a domestic item restriction does not provide a basis on which the Army could award a contract to Gumsur; the Army is precluded by statute from doing so. Nor do we believe that the agency's failure to provide notice of the restriction in the IFB means that the Army must cancel the solicitation and issue a new one. No benefit would accrue to Gumsur because we have found that the domestic item restriction is unobjectionable and Gumsur does not argue that, if given a chance, it could offer a suit manufactured in the United States. In addition, there is no indication that other potential bidders would compete under a revised IFB.

The protest is denied. Because we deny the protest, Gumsur is not entitled to recover its protest costs. See Friends of the Waterfront, Inc., B-225378, Jan. 6, 1987, 66 Comp. Gen. ___, 87-1 CPD ¶ 16.

James F. Hinchman
General Counsel